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Subpoena Duces Tecum Final Decision Rule and the Informer's Privilege

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SUBPOENA *DUCES TECUM*: FINAL DECISION RULE AND THE INFORMER'S PRIVILEGE

*Westinghouse Elec. Corp. v. City of Burlington**

The City of Burlington brought a treble damage action against Westinghouse Electric Corporation. This was one of the more than 1800 such actions instituted in the wake of the antitrust convictions of major electrical equipment manufacturers. While the statute of limitations for treble damage actions is four years,[1] it has been held that the period of limitation is tolled by the fraudulent concealment of an antitrust violation.[2] Plaintiff claimed there had been such a fraudulent concealment and sought damages for transactions beyond the four-year period. In defending this claim Westinghouse sought to secure from the Attorney General of the United States certain documents which would show that plaintiff knew of these illegal practices and that the statute therefore should not be tolled.

The desired documents were "complaints by publicly or privately owned utilities or by associations of such utilities that manufacturers of electrical equipment were, or might have been, violating the antitrust laws with respect to the sale of such equipment during the period between January 1, 1948, and December 31, 1960."[3] A subpoena *duces tecum* directing the production of these papers was served upon a representative of the Attorney General. Claiming that the documents were protected from disclosure by the "informer's privilege," the Government moved to quash the subpoena. The District Court for the District of Columbia accepted this argument and granted the Government's motion. The circuit court of appeals allowed an immediate appeal from the order and reversed with directions to the district court to permit production of the documents under stated conditions.

This case presents two interesting issues: (1) whether the order quashing the subpoena was properly appealable, and (2) whether the Government could refuse to produce the desired documents on the ground of privilege.

Appealability of Order Quashing Subpoena

The Government had moved to dismiss the appeal, arguing that the order was not final and therefore not appealable. Under ordinary circumstances appeal from an interlocutory order is denied in order to avoid "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise . . . ."[4] To this end Congress has provided that "the courts

* 351 F.2d 762 (D.C. Cir. 1965).

1 Clayton Act § 5(b), 69 Stat. 283 (1955), 15 U.S.C. § 15(b) (1964).

2 The circuits that have passed on the question have held that the statute is tolled by fraudulent concealment. Public Serv. Co. v. General Elec. Co., 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963); Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), cert. denied, 373 U.S. 914 (1963).

3 Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 764 (D.C. Cir. 1965).

4 Cobbledick v. United States, 309 U.S. 323, 325 (1940). See also Alexander v. United States, 201 U.S. 117 (1906); Segurola v. United States, 275 U.S. 106, 112 (1927), where the court stated that neither a party nor a nonparty witness will be allowed to take a ruling to the higher court where the result of the review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . ."

of appeals shall have jurisdiction of appeals [only] from . . . final decisions of the district courts . . . ."[5]

There are situations, however, in which it has been held that a quashing order might be considered final. In *Horizons Titanium Corp. v. Norton Co.*,[6] a subpoena was directed to a nonparty, and the quashing order was issued by a court sitting in a circuit other than the one in which the main action was pending. Creating a new concept of finality, the First Circuit deemed the order appealable. Judge Aldrich reasoned that "the order of the district court made a final disposition of the only proceedings in its district growing out of a particular controversy, and the only proceedings pending between these particular parties anywhere."[7] What is critical, the court observed, is whether the party unsuccessfully seeking the subpoena has any means of review if an immediate appeal is disallowed. In *Horizons Titanium* there would have been no review of the order, since the court of appeals hearing the main case had no appellate jurisdiction over an order issued by a court in another circuit.[8] This being so, the order was considered final.

Another exception to the rule against interlocutory appeals was created by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*[9] In a stockholder's derivative action the trial court refused to apply a security-for-expenses statute of the forum state, and the issue was whether this order was appealable. The Supreme Court recognized:

> [A] small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[10]

The Court held the order appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[11]

Recently, in *Gillespie v. United States Steel Corp.*,[12] the Supreme Court expanded the concept of finality by allowing an appeal from a nonfinal order when the question presented was "fundamental to the further conduct of the case."[13] In that case decedent's mother sought to recover damages for herself

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[5] 28 U.S.C. § 1291 (1964).

[6] 290 F.2d 421 (1st Cir. 1961).

[7] Id. at 424.

[8] 28 U.S.C. § 1294 (1964). Cf. Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 996-97 (10th Cir. 1965).

[9] 337 U.S. 541 (1949).

[10] Id. at 546.

[11] Id. at 546-47. See also Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684 (1950) where an order vacating a foreign attachment of a vessel in an admiralty case was held appealable. Citing Cohen, the Court said: "appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." Id. at 689. The Court went on to say that the statute should not be construed "so as to deny effective review of a claim fairly severable from the context of a larger litigious process." Ibid. In DiBella v. United States, 369 U.S. 121 (1962), the Supreme Court used similar language, saying that an appeal should not be denied "when the practical effect of the order will be irreparable by any subsequent appeal." Id. at 126 (dictum).

[12] 379 U.S. 148 (1964), 51 Cornell L.Q. 369 (1966).

[13] Id. at 154.

and for decedent's brother and sisters under the Jones Act[14] and the state wrongful death act. The district court struck all reference to the state law, stating that the Jones Act provided the exclusive remedy, and held that under this act there could be no recovery for the benefit of decedent's brother and sisters. An immediate appeal was allowed.

While stating no test for determining what was fundamental, the Court rested its decision on the fact that the claims of the brother and sisters were effectively cut off and delay would cause undue hardship. As authority for this position the Court cited *United States v. General Motors Corp.*,[15] where the propriety of including certain items of damage in an eminent domain award was said to be a fundamental issue.

In order to fit *Westinghouse* within any of these exceptions it is necessary to determine the basic requirements of each. In *Horizons Titanium* there are three such requirements: (1) the subpoena must be directed to a nonparty; (2) the court passing on the motion must not be in the circuit in which the main action is pending; and (3) there must be no other means of review available. The ingredients of the *Cohen* exception are not as clearly defined. A certain degree of independence from the main action, as well as self-contained importance, is required. The one requirement of the *Gillespie* exception is fundamentalness, which is determined by balancing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[16]

It would have been difficult to analogize *Westinghouse* to the *Cohen* situation. The question presented in *Cohen* had little to do with the main claim and was easily severable from it, while the issue in *Westinghouse* was inextricably tied up with the rest of the litigation. The situation presented in *Westinghouse* comes closer to the *Gillespie* exception. If the court were to accept as fundamental the issue of damages, as the Supreme Court did, then *Gillespie* would seem to apply, as the question here relates ultimately to the amount of damages. However, to say that *any* issue relating to the amount of damages is fundamental to the further conduct of the case and thus deserving of an immediate appeal would be a radical departure from the statute prohibiting appeals from nonfinal orders. Perhaps it is for this reason that Judge Washington chose instead to rely on *Horizons Titanium*, completely omitting any discussion of *Gillespie*.

Of the three elements of the *Horizons Titanium* test, only the first was present in *Westinghouse*. The other two were only indirectly involved by virtue of the National Discovery Program.[17] This program, promulgated with a view to speedier disposition of the numerous similar treble damage actions pending throughout the country, provides for a national depository for the many documents produced through discovery procedure. This depository was designed to avoid repetitious and overlapping discovery and to make available to de-

[14] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).
[15] 323 U.S. 373 (1945).
[16] Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964), citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).
[17] For a discussion of this program, see Neal & Goldberg, "The Electrical Equipment Antitrust Cases: Novel Judicial Administration," 50 A.B.A.J. 621 (1964).

fendants, subject to certain conditions, relevant documents obtained in other actions.

Because there were defendants in other jurisdictions who were interested in the information sought here, Judge Washington reasoned that the *Horizons Titanium* test could be applied. Conceding that the defendant in the present action would have an opportunity to have the order reviewed in an appeal from the main case, he went on to say:

> This approach, however, overlooks the fact that numerous defendants in other jurisdictions, involved in the National Discovery Program, are also interested in this subpoena; and they may have no review of the decision as it affects them if we do not review it herein. We see no reason why their claim to prompt appellate review should rest on the decision of the defendants below . . . whether or not to appeal . . . .[18]

To fit this case within the confines of the *Horizons Titanium* test, Judge Washington thus treated the motion as if it had been made to the District Court of the District of Columbia by a defendant in some other jurisdiction. Had the motion in fact been made by such a defendant the order would have been final, as finality is defined in *Horizons Titanium*, and therefore appealable. But such is not the case, and the court created a legal fiction which not only defies the terms of the statute, but is also inconsistent with the case from which it draws support. *Horizons Titanium* is not, as Judge Washington seemed to imply, an exception to the rule that only final decisions are appealable. Rather, it is a construction of the term "final decision." There the court found that the order involved could be reviewed only by an immediate appeal and that it therefore was a final decision within the meaning of the statute. The order in *Westinghouse*, however, was reviewable at a later date and hence was not final under the *Horizons Titanium* formulation of the rule. Only through use of a cleverly constructed legal fiction was Judge Washington able to come within this formulation. The difference between these cases is that in *Horizons Titanium* the court construed the statute to encompass the situation of that case, whereas in *Westinghouse* the court created an exception to the statute, in effect saying that the order should be appealable because so many other defendants were interested in it.

Implicit in the rationale of *Westinghouse*, however, is a realization that civil antitrust cases are costly and clog the courts for extended periods. If an immediate review of the order were not allowed and it were ultimately reversed on appeal from the main case, further congestion in the courts would result. Although this is an extension of the *Horizons Titanium* test and contrary to the "final decisions" rule, it is consistent with the pragmatic policy of the National Discovery Program and will save considerable time and expense.[19]

It is interesting to contrast this approach with the approach taken by the Supreme Court in *Roche v. Evaporated Milk Ass'n.*[20] In refusing to review

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[18] Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 766 (D.C. Cir. 1965).

[19] The Horizons Titanium rule is not accepted in all the circuits. See, e.g., Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955). This decision in effect makes that rule applicable to other circuits in that now defendants outside this circuit will have immediate access to the documents by virtue of the National Discovery Program.

[20] 319 U.S. 21 (1943).

an interlocutory order, the Court recognized that the trial in advance of appellate determination would be long and costly. It said, however, that this "inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."[21]

Use of Discovery Procedure Against the Government

The second issue raised by the Government was that the informer's privilege supported the trial judge's decision to quash the subpoena. Inevitably drawn into the controversy was the whole question of the use of the discovery procedure against the Government. Although originally the Government made a claim to the contrary,[22] it is now quite clear that the discovery rules may be applied against the United States just as fully as against any private litigant.[23] In the past, however, the Government has claimed a broad statutory privilege based on the Housekeeping Statute.[24] The Government has claimed that under the provisions of this statute it may prohibit by regulation the disclosure, in private litigation, of any information which a department head deems desirable to withhold.[25] An early Supreme Court case[26] held that, when a subordinate is cited for contempt for his failure to produce the desired documents, the statute and regulations thereunder would provide him with a complete defense if the regulations withheld disclosure of the documents in question. Whether the department head could himself be required to produce the documents in private litigation was apparently never decided,[27] although it was suggested that he could be compelled to do so.[28]

In 1958 the following language was added to the Housekeeping Statute: "This statute does not authorize withholding information from the public or limiting the availability of records to the public."[29] Although it is not certain what effect the amendment has upon the subordinate's defense to a contempt citation, it does preclude a department head from claiming a privilege on the basis of the Housekeeping Statute alone.[30] The amendment makes it clear that the statute does not of its own force create a privilege where none otherwise exists.[31]

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21 Id. at 30.

22 United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942), where the Government claimed its freedom from discovery was part of its sovereign immunity. See also O'Reilly, "Discovery Against the United States: A New Aspect of Sovereign Immunity?" 21 N.C.L. Rev. 1 (1942).

23 United States v. Procter & Gamble Co., 356 U.S. 677 (1958). In this case the Government at least implicitly conceded that it is subject to the discovery rules. See Brief for Appellant, pp. 31-53.

24 Rev. Stat. § 161 (1875), 5 USCA § 22 (1964):

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it.

25 See 25 Ops. Att'y Gen. 326 (1905).

26 Boske v. Comingore, 177 U.S. 459 (1900).

27 2A Barron & Holtzoff, Federal Practice and Procedure § 651.1 (Wright ed. 1961).

28 Frankfurter, J., concurring in United States ex rel. Touhy v. Ragen, 340 U.S. 462, 470-73 (1951).

29 72 Stat. 547 (1958), 5 U.S.C. § 22 (1964).

30 See Note, "Discovery From the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute," 69 Yale L.J. 452 (1960).

31 See United States v. Swift & Co., 24 F.R.D. 280 (N.D. Ill. 1959). In Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749 (9th Cir. 1964) the court stated that the only

The Informer's Privilege

Since the Government has no general right to withhold information, any refusal to disclose must be "predicated upon the specific claim of some privilege based upon considerations peculiar to the operations of government or the government must conform to the rules governing private parties."[32] The Federal Rules provide that discovery may be had on any matter "not privileged."[33] The concept of privilege under the Rules is the same as that applicable under the rules of evidence,[34] so that if the information sought would be excluded at trial on grounds of privilege, it is not discoverable. This is in contrast to the discovery of information which is not claimed to be privileged, where the requirement is not that it be admissible but only that it be relevant.[35]

The informer's privilege is one variation of an evidentiary privilege accorded a larger class of information known as "confidential communications."[36] Wigmore states the following test for determining whether a communication will be accorded this privilege:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[37]

This privilege is the "Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."[38] It has long been recognized at common law,[39] and has become embodied in the statutory law of several states.[40]

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effect of the statute was to require that demands for documents be made upon the department head rather than a subordinate, and that the statute and regulations do not of their own force justify nondisclosure.

[32] United States v. Swift & Co., supra note 31, at 284.

[33] Fed. R. Civ. P. 26(b).

[34] United States v. Reynolds, 345 U.S. 1, 6 (1953).

[35] Fed. R. Civ. P. 26(b).

[36] 8 Wigmore, Evidence §§ 2285, 2374 (McNaughton ed. 1961).

[37] Id. § 2285.

[38] Roviaro v. United States, 353 U.S. 53, 59 (1957) (but holding information not privileged in case before the Court).

[39] It is perfectly right that all opportunities should be given to discuss the truth of the evidence against the prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed.

Rex v. Hardy, 24 How. St. Tr. 199 (1794). See also In re Quarles, 158 U.S. 532 (1894); United States v. Moses, 27 Fed. Cas. 5 (E.D. Pa. 1827).

[40] Cal. Civ. Proc. Code § 1881(5); Colo. Rev. Stat. Ann. § 154-1-7(6) (1963); Ga. Code Ann. § 38-1102 (1954); Idaho Code Ann. § 9-203(5) (1948); Iowa Code Ann. § 622.11 (1950); Minn. Stat. Ann. § 595.02(5) (1947); Neb. Rev. Stat. § 25-1208 (1964); Nev. Rev. Stat. § 48.090 (1959); N.J. Stat. Ann. § 2A:84A-27 (Supp. 1965); N.D. Cent. Code § 31-01-06 (1960); Ore. Rev. Stat. § 44.040(1)(e) (1957).

Purpose and Scope of the Privilege

The justification for the informer's privilege is not protection of the informer.[41] Rather, its primary purpose is the protection of the government's flow of information, which is deemed essential to the effective implementation of the law.[42] It is generally conceded that only by guaranteeing anonymity can the government be assured of a continued flow of this type of information.[43] The privilege is most commonly applied in criminal cases,[44] but is also often raised in civil actions—such as civil antitrust cases,[45] Fair Labor Standards Act cases,[46] and cases between private litigants where the government has some information essential to the case of one of the parties.[47]

The Supreme Court rendered a thorough review of the privilege in *Roviaro v. United States*,[48] and removed the absolute protection previously given to an informer's identity.[49] Limiting the privilege to its "underlying purpose,"[50] the Court made it clear that the scope of the privilege should not be extended further than is necessary to protect the flow of information.

The most important factor regulating this flow is, of course, the effect on the informer's willinguess to volunteer information if he knows that anonymity is not guaranteed. Thus, in each case the court must decide whether, in the particular instance before it, disclosure will impede the flow of vital information to the government. The reasons for not wanting one's identity as an informer disclosed may vary greatly. They may range from a well-founded fear of retaliatory violence in a criminal case,[51] or a fear of being fired from

[41] Wilson v. United States, 59 F.2d 390 (3d Cir. 1932):

> It is the right and the duty of every citizen of the United States to communicate to . . . the government . . . all the information which he has of the commission of an offense against the laws of the United States, and such information is privileged as a confidential communication which the courts will not compel or permit to be disclosed without the consent of the government. Such evidence is excluded, not for the protection of the witness, but because of the policy of the law.

Id. at 392.

[42] Roviaro v. United States, 353 U.S. 53, 59 (1957).

[43] 8 Wigmore, Evidence § 2374 (McNaughton ed. 1961).

[44] See, e.g., United States v. Konigsberg, 336 F.2d 844 (3d Cir.), cert. denied, 379 U.S. 933 (1964); United States v. Whiting, 311 F.2d 191 (4th Cir. 1962), cert. denied, 372 U.S. 935 (1963).

[45] United States v. Grinnell Corp., 30 F.R.D. 358 (D.R.I. 1962); United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); United States v. Lorain Journal Co., 10 F.R.D. 487 (N.D. Ohio 1950); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949).

[46] Wirtz v. Continental Finance & Loan Co., 326 F.2d 561 (5th Cir. 1964); Mitchell v. Johnson, 274 F.2d 394 (5th Cir. 1960); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959).

[47] See, e.g., Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Foltz v. Moore McCormack Lines, Inc., 189 F.2d 537 (2d Cir.), cert. denied, 342 U.S. 871 (1951); Clark v. Pearson, 238 F. Supp. 495 (D.D.C. 1965).

[48] 353 U.S. 53 (1957). This case involved a criminal action but has been held to apply to civil actions; see, e.g., Mitchell v. Bass, 252 F.2d 513, 516 (8th Cir. 1958); Henrik Mannerfrid, Inc. v. Teegarden, 23 F.R.D. 173 (S.D.N.Y. 1959).

[49] Vogel v. Gruaz, 110 U.S. 311 (1884). A court has recently applied this rule of absolute privilege, citing Vogel v. Gruaz and apparently ignoring Roviaro. In re Gurnsey's Petition, 223 F. Supp. 359, 360 (D.D.C. 1963).

[50] Roviaro v. United States, 353 U.S. 53, 60 (1957).

[51] The Arnold Schuster murder case was a vivid illustration of the dangers to which an informer in a criminal case is exposed. Schuster's identification led to the arrest of notorious bank robber Willie Sutton. A few days after the New York police disclosed the informer's identity, he was found mysteriously slain. New York Times, Feb. 21, 1952, p. 1, col. 2; id., March 9, 1952, p. 1, col. 8. Schuster's widow then recovered in a tort action

one's job in a labor case,[52] to a fear of social or economic sanctions in the present type of case. The motive behind this reluctance should in no way be controlling. If the court decides that disclosure of the informer's identity in the case before it will cause other potential informers in similar cases to remain silent, no matter what their motives for doing so, the privilege should be applied.

In criminal cases the effect of disclosure on other informers' willingness to give information, and hence the need for the privilege, is clear. In private antitrust actions the need is not so obvious. Here the informer has a monetary incentive to volunteer the information, and the likelihood of reprisal is slight. Furthermore, when an informer gives information of antitrust violations with a view toward becoming a party to a private action against the offender, he knows he will be subject to compulsory discovery procedure through which his identity as an informer may be disclosed. This, coupled with the monetary incentive and small chance of retaliation, indicates that a policy of nondisclosure will do little to further the purpose of the privilege, and that therefore the privilege should not prevent disclosure of the documents in such a case.

Of course, not all suppliers of this type of information are acting with a view toward a treble damage action. Their only incentive may be a cessation of the acts complained of, and this might not be a strong enough incentive if they thought their identities would be disclosed. In antitrust actions brought by the Government, therefore, the informer's privilege usually precludes disclosure.[53]

Conceding that in Government antitrust actions a policy of nondisclosure is necessary to protect the flow of information and that this information is essential to a proper implementation of the law, the question arises as to whether a policy of disclosure in private litigation will have any effect on this flow. The answer must necessarily be no. Under this dual policy of disclosure in private cases and nondisclosure in Government cases, the informer will know, at the time he decides whether or not to bring a treble damage action, whether or not his identity will be disclosed. If he decides not to bring such an action, his identity will not be disclosed, and there will be no possibility of retaliation. If he does file suit, the mere fact of bringing the action will open him to retaliation, if there is to be any, just as surely as would disclosure that he was an informer.[54] This being so, the identity of an informer need no longer be kept secret once he has become a plaintiff in a private action.

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against the city of New York. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[52] See Wirtz v. B.A.C. Steel Prods., Inc., 312 F.2d 14, 16 (4th Cir. 1963), where the court in refusing to disclose the names of employees who had complained to the labor department, stated:

> The average employee . . . is keenly aware of his dependence upon his employer's good will not only to hold his job but also for the necessary job references essential to employment elsewhere. Only by preserving their anonymity can the government obtain the information necessary to implement the law properly.

[53] See the cases cited at note 45 supra.

[54] The court in Westinghouse stated this in terms of waiver: "The plaintiffs in this case should be regarded as having waived the informer's privilege . . . . [P]laintiffs have not stated that they were informers. They have, however, taken a position sharply adverse to that of the defendants." Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 770 (D.C. Cir. 1965). This is a somewhat inaccurate statement. Since the privilege belongs to the Government and not the plaintiff, only the Government can waive it.

The Fundamental Fairness Requirement

Even if the court were to conclude that disclosure would interrupt the flow of information, the claim of privilege may be overcome by other considerations. Prior to *Roviaro* a finding that disclosure would impede the flow of information was an absolute prohibition against disclosure of the informer's identity.[55] This privilege was qualified in *Roviaro* by the "fundamental requirements of fairness,"[56] and was said to fail when the informer's identity "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ."[57] The Court set forth a balancing test: "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."[58]

In applying this test an initial determination of the interests sought to be protected and the effects of disclosure or nondisclosure on these interests must be made. That the Government has an interest in a continual flow of information relating to violations of the antitrust laws cannot be disputed. As stated in *United States v. Deere & Co.*:[59]

> Without the anti-trust laws and resulting actions to enforce them, monopoly would strangle competition and threaten the Nation's economic well-being. Encouraging such information from the citizenry on such matters is just as important and emphatic as encouraging information of violations of the criminal laws of the Nation. The public interest and welfare is the object of protection.[60]

No matter how great this interest is, however, it should not be accorded great weight in applying the test if disclosure of the informer's identity will have little effect. As previously discussed, disclosure in this type of case will probably do little to impede the flow of information. Unless the defendant's need for this information in preparing his case is minimal, disclosure should be ordered.

From the standpoint of preparing its defense, the defendant may of course be able to obtain some of the information from the plaintiff through discovery procedure, and to this extent will be able to defend at least part of the claim without forcing the Government to produce any documents.[61] However, it may be impossible to obtain all the desired information from the plaintiff, either because of destruction of old files, departure or death of personnel, or memories dimmed by lapse of years. To the extent that this has occurred, defendant can prevent the tolling of the statute of limitations only by the use of the information presently in the hands of the Government. While the effect of being able to defend its claim can only be estimated, if defendant can show that the statute has been tolled, it will be relieved of liability for any transactions prior

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55 Vogel v. Gruaz, 110 U.S. 311 (1884).
56 Roviaro v. United States, 353 U.S. 53, 60 (1957).
57 Id. at 60-61.
58 Id. at 62.
59 9 F.R.D. 523 (D. Minn. 1949).
60 Id. at 526.
61 The court recognized this difference and directed the trial judge to "be sure that the defendants had made full use of discovery procedures against the plaintiff" in order to lighten the load on the government. Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 767 n.8 (D.C. Cir. 1965).

to the limitation period. This could amount to a considerable portion of the damages claimed.[62] Balancing these factors, it would seem that the court in the noted case was correct in denying the privilege.

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[62] A dramatic illustration of the critical importance of the fraudulent concealment issue is provided by the judgment in one of the few treble damages actions that has gone to trial. On special interrogatories to the jury to establish the amount of damages for transactions before and after the limitation period, the jury found the damages were, respectively, $3,400,000 and $5,700,000. Bearing in mind that this will be trebled, it is evident that the desired information is of the utmost importance. Philadelphia Elec. Co. v. Westinghouse Elec. Corp., Civil No. 30015 (E.D. Pa. 1964).